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Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1085

ELISHA COMBS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

ELISHA COMBS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 10, 1972.

OPINIONS BELOW

The opinion of the District Court is unreported and set forth in the Appendix, p. 19, herein. The opinion and order denying Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit are unreported and set forth in the Appendix, p. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 10, 1972. Petition for Rehearing was denied January 8, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether an affidavit for a search warrant showing the presence of firearms in the residence of Pearl Combs, and a search warrant issued pursuant thereto for "the premises" of Pearl Combs, including Pearl Combs' house and "all out-buildings and vehicles thereon. * * * including any and all adjacent properties used by the said Pearl Combs", was constitutionally sufficient to authorize the search and seizure of a Cadillac automobile owned by the petitioner, a visiting adult son of Pearl who lived over two hundred miles away, parked nearby on the property of one Ollie Taylor in a "community parking area" used by the Taylors, Pearl Combs and others.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

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STATEMENT

Petitioner was indicted for illegal possession of firearms under 28 U.S.C. §§ 5861 (c) and (d), 18 U.S.C. Appendix § 1202 (a), and 18 U.S.C. §§ 922 (j) and 2315 solely because:

On October 13, 1970, in the evening hours, the Chief of Police of the City of Hazard, Kentucky, received a telephone call from the Newport, Kentucky, Police Department requesting assistance in arresting Raymond Combs, a son of Pearl Combs, for whom they had a warrant. Pearl Combs, father of Raymond, lived in an area adjacent to the City of Hazard known as "Gorman Hollow". In urbane language, the area may be described as a suburb to an appalachian city. (Appendix, p. 31).

The petitioner, also son of Pearl, was visiting his father. Elisha lived in Northern Kentucky, over two hundred miles away. In the mountains of Eastern Kentucky, unlike most suburbs, the country consists of creeks and hollows between mountains with parking areas a severe problem. Here, Pearl's adjoining property owner, one Ollie Taylor, had done the neighborly thing by establishing a "community parking area" on his property, where he, Pearl, tradesmen and others driving to the neighborhood parked. The Cadillac of the petitioner, Elisha Combs, was parked on the Taylor property in that parking area with 3 or 4 other cars, approximately seventy-five feet from his father's house. (Appendix, pp. 31, 39, 41-42).

This was the situation when the Chief of Police and other Hazard City Police arrived at the Pearl Combs residence. Raymond, who they were seeking, jumped off the porch and fled the scene. The officers entered the house, found a large quantity of firearms and ammunition, and left to obtain a search warrant. While there, they saw the petitioner's Cadillac in the community parking area, car-

rying a Campbell County, Kentucky, tag (indicating it was from Northern Kentucky), with a spare tire in the back seat and sitting low in the rear. They returned to Hazard, determined that Pearl Combs and the petitioner had been convicted of a felony, made an affidavit and obtained the search warrant in issue from the United States Commissioner, who was awaiting them in Hazard. (Appendix, pp. 32-34).

The affidavit for search warrant reads:

"BEFORE Kelly Clore, Pineville, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

> The Pearl Combs residence consisting of a one story frame dwelling painted white with 5 or 6 rooms, basements, attics, and appurtenances and having a porch on the West and North sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the East side of the Gorman Hollow Road, approximately 1 mile from the junction of the Gorman Hollow Road and Kentucky State Highway 451, and being approximately 50 yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately ½ mile, in a Southerly direction, from the old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs

in the Eastern District of Kentucky

there is now being concealed certain property, namely

> A large number of illegally possessed firearms and ammunition including automatic, Pump, Single barrel and double barrel Shotguns, Automatic, Bolt Action Repeaters, and single shot 22 calibre

rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms, and also various types of ammunition

which are Illegally possessed by Pearl Combs who is a convicted felon

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I, the Chief of Police of Hazard, Kentucky, on October 13, 1970, at approximately 9:30 P.M., while on official duty attempting to execute an arrest warrant, together with Police Officers Robert G. Byrgo, Edgar Reynolds Jr., and Captain George R. Smith, saw in the house situated on the Pearl Combs premises, a large number of firearms and ammunition some of which firearms were covered with blankets and sheets, some in uncovered stacks, and some sitting in corners, behind doors, and along the walls of said house. I personally know that Pearl Combs is a convicted felon. I make this affidavit at 2:10 A.M., on October 14, 1970.

/s/ Sam L. Luttrell,
Signature of Affiant.
Chief of Police, Hazard, Kentucky,

Sworn to before me, and subscribed in my presence, October 14, 1970

/s/ Kelly Clore,
United States Commissioner."

(Appendix, pp. 27-28).

The search warrant reads:

"To: ATF Special Investigators Donald F. Nierengarten and James L. Brown or any other authorized officer.

Affidavit having been made before me by Sam L. Luttrell, Chief of Police, Hazard, Kentucky.

that he is positive that on the premises known as

> The Pearl Combs residence, consisting of a one story frame dwelling painted white with five or six rooms, basements, attics, and appurtenances, and having a porch on the west and north sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the east side of the Gorman Hollow Road, approximately one mile from the junction of the Gorman Hollow Road and Kentucky State Highway 415, and approximately fifty yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately one-half mile, in a southerly direction, from old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs

in the Eastern District of Kentucky,

there is now being concealed certain property, namely

> a large number of illegally possessed firearms and ammunition, including automatic, pump, single barrel and double barrel shotguns, automatic bolt action repeaters and single shot 22 caliber rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms and also various types of ammunition

which are illegally possessed by Pearl Combs who is a

> convicted felon, in violation of Title 18, USC, Section 1202 (a) (1).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named by the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14th day of October, 1970

/s/ Kelly Clore,
U.S. Commissioner."

(Appendix, pp. 29-30).

The Hazard Police and ATF Agents returned to the premises, searched the Pearl Combs residence, found and seized the firearms, and searched some of the automobiles in the Taylor parking area. (Appendix, pp. 36-38).

The officers then went to the Cadillac. The spare tire was still in the back seat, the rear end was still low, and the officers started to search it. Petitioner offered a key to the ignition but refused to open the trunk. The officers forced it. On opening the trunk, the officers observed firearms, ammunition and other goods. They closed the trunk, drove the car into the City of Hazard and conducted a thorough search and inventory of the trunk.

The District Judge, knowledgeable in the area, made these specific findings:

"I have given this matter considerable thought, Gentlemen, and I am concerned with the search of the Cadillac automobile. I don't think there is any question on the evidence that was adduced here that these officers had authority to go in with this warrant of arrest on file and search this house for the defendant, Raymond Combs, and while they had the information

and thought they had seen him there on the porch and that he went in the house, and an apparent effort was made to divert their attention, I think they were entitled to go in there with the arrest warrant.

But I am gravely concerned about the search of the Cadillac automobile. It is not described in the search warrant. It was located on somebody else's property, and on top of that, they didn't search it at the scene. They started to prize it open, took some things out of it and put them all back in it and took it to the Police Station and proceeded to search it there some two or three hours later. I don't believe there was probable cause for the search of the Cadillac automobile, and to that extent the Motion to Suppress is sustained — as to the search of the car, and any evidence obtained thereunder.

As to anything found in the house at the time of the attempt to execute the warrant of arrest for the defendant, Raymond Combs, the motion to Suppress is overruled, and it is so ordered."

* * *

"Of course, another question, they may overrule the Court's ruling. But, I just don't believe you can stretch the wording of that affidavit for the search warrant, and the search warrant, to include this automobile sitting down there on apparently what is kind of a community parking space and not even on this property. In addition to those factors, there was nothing to preclude them from getting a search warrant for the car."

ARGUMENT

THE AFFIDAVIT FOR AND THE SEARCH WARRANT BASED THEREON WERE NOT CONSTITUTIONALLY SUFFICIENT TO AUTHORIZE SEARCH AND SEIZURE OF THE CADILLAC.

The District Court aparently decided this case on the basis of *Coolidge* v. *New Hampshire,* 403 U.S. 443, for immediately preceding his oral ruling above set out, he said:

> "Mr. Combs: If your Honor please, did you get my last memorandum?
> The Court: About the Coolidge case?
> Mr. Combs: Yes.
> The Court: Yes, I got it Saturday and it destroyed part of my weekend by reading it." (Appendix p. 19)

In *Coolidge* this Court brought the automobile within the protection of the Fourth Amendment by using this language:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. * * *" (403 U.S. at 461).

In *Coolidge* this Court goes on to illustrate that here, as there, a warrantless search is clearly unlawful, by saying:

> "* * * And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States — no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, on contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police

> detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant.' Carroll, supra, at 153, 69 L Ed at 551, 39 ALR 790, and the 'automobile exception', despite its label, is simply irrelevant." (403 U.S. 462).

The United States Court of Appeals for the Sixth Circuit reversed this case, upon the concept that the affidavit and search warrant for Pearl's premises were sufficiently broad to embrace the petitioner's Cadillac on Taylor's land:

> "The record indicates that the Cadillac was on 'the premises' situated closely enough to the house to be within legal concept of curtilage. See Fine v. United States, 207 F. 2d 324 (6th Cir. 1953); United States v. Potts, 297 F. 2d 68 (6th Cir. 1961). The record also indicates that this house was located in a remote area. The arsenal found therein could hardly have been brought there by any means other than automobile. Under these circumstances we feel it was permissible for the Commissioner to infer from the facts before him probable cause to believe that vehicles on the premises contained similar weapons to those found in the house." (Appendix, p. 25).

The Court of Appeals apparently became derailed by this Court's holding in *United States* v. *Ventresca*, 380 U.S. 102, where the Court held that a non-technical reading of the affidavit should be made. With this we agree. But where we leave the Court of Appeals is when that Court adopts the concept that an affidavit for a search warrant, showing the probable commission of a crime in the home of a citizen, permits the issuance of a search warrant of sufficient scope and breadth to authorize officers to search not only all the premises of the citizen involved, but also to search automobiles of others in a community parking area off the premises. We differ even

more strongly when that Court holds that may be done at random, depending upon the whim of the officers, when the officers observed the very same automobile prior to the search and had ample opportunity to secure a specific search warrant for it. What we are saying is that we abhor the very notion that a peace officer may, by a search warrant directed toward one person's premises, ransack every automobile in the area.

The most this Court held in *Ventresca* is that a nontechnical reading of the affidavit should be made, with a liberal construction in favor of upholding the validity of the warrant. But here the warrant is admittedly valid. Only its scope is in issue. *Ventresca* clearly does not apply.

The Court of Appeals misconceived the facts when it said in its opinion that the Cadillac was on "the premises" by misconstruing "the premises" to embrace adjoining lands of others and automobiles of others thereon.

The words in the warrant, authorizing the search of "the premises" of Pearl Combs, including the house and "all buildings and vehicles thereon . . . including any and all adjacent properties used by the said Pearl Combs" must be construed in the light of the purpose of the search. The firearms were observed in the Pearl Combs dwelling. The warrant could, without Fourth Amendment hazard, be extended to the premises, including the entire curtilage. The Commissioner did so, using "the premises" as his target. Properly construed, it designated the Pearl Combs premises, including the dwelling house, all buildings, vehicles and areas *on the premises* "used by the said Pearl Combs." Otherwise, it is unconstitutionally vague and overbroad.

Property adjacent to the Pearl Combs premises could be anywhere in the neighborhood. And "adjacent properties used by the said Pearl Combs" could conceivably

embrace any nearby streets, highways, public and private parking areas, or even residences, barns and out buildings of neighbors used by him in any degree.

The holding of the Court of Appeals does not even stop there. The Court goes on to say that the officers were authorized to search not only vehicles and the like owned by Pearl Combs on "adjacent property" but also any property of others of whatsoever kind or nature on "adjacent" property. In short, the Court of Appeals held that the officers here involved were constitutionally equipped under the search warrant to search any property of any kind and nature, from baby carriages to coffins, regardless of ownership, so long as the property ransacked was on "adjacent properties" used by Pearl Combs.

We feel that the decision of the Court of Appeals demonstrates blatent disregard of this Court's constant warning that the Fourth Amendment should receive a liberal construction so as to prevent stealthy encroachment upon or gradual depreciation of the rights secured by it, whether by imperceptible practice of Courts or by well intentioned but mistakenly overzealous executive officers.

The Court of Appeals, while noting that the ground on which the Cadillac was parked may not actually have belonged to Pearl Combs, nevertheless held that the Cadillac, owned by the petitioner, on the property of another, was "on 'the premises' situated closely enough to the house to be within legal concept of curtilage. See *Fine* v. *United States*, 207 F. 2d 324 (6th Cir., 1953); *United States* v. *Potts*, 297 F. 2d 68 (6th Cir., 1961)." (Appendix, p. 25).

Fine and *Potts* do not so hold.

In *Fine*, the illegal evidence sought to be suppressed was not found in the house of Fine, but was found in a shed in the back yard of the Fine premises. In that case the Court said:

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> "It was not improper to extend the search to this shed. The warrant authorized search of the 'premises known as the Harve Fine residence' and of the 'place named.' These terms are broader than a mere description of the house and certainly include the curtilage. While the shed is protected from unreasonable search and seizure, Roberson v. United States, 6 Cir., 165 F. 2d 752; Baxter v. United States, 6 Cir., 188 F. 2d 119, it is not protected from a valid search." 207 F. 2d 325.

In *Potts*, a search warrant was not involved. In that case, the Revenue Agents observed the defendants under suspicious circumstances in and around the Potts premises, and a search of the smoke house behind the unoccupied dwelling yielded untaxed whiskey. Potts contended that the smoke house on his premises was within the "curtilage," and the Court agreed. But the Court went on to hold that there was probable cause for the belief that Potts and others were committing a felony, which justified an arrest without a warrant and as an incident the search and seizure complained of.

This brings us back to the crucial issue of whether the affidavit and search warrant, as construed by the Court of Appeals, is unconstitutionally vague and overbroad as it affects the Cadillac. We know of no better way to approach the problem than to revisit the Fourth Amendment to the Constitution of the United States:

IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The search and seizure of the Cadillac was based upon an oath or affirmation and with probable cause as to the premises of Pearl Combs. The finding of firearms in the dwelling house of Pearl Combs furnished probable cause for its issuance and the warrant properly embraced Pearl's property within the curtilage. It adequately described his premises and expressly included not only the dwelling but also the outbuildings and vehicles thereon.

It is constitutionally proper for the searching officers to search any motor vehicle situated on the premises as being within the "curtilage." See for example *Brooks* v. *United States,* 416 F. 2d 1044 (5th Cir., 1969).

The problem arose when the officers extended their search from the premises of Pearl Combs to the motor vehicles of others on Taylor's land. The affidavit stated no probable cause whatever for the searching of Taylor's land, and Taylor's land was in no way described or referred to. Moreover, the search warrant itself did not purport to extend to Taylor's land, did not describe Taylor's land and did not provide any method of identifying Taylor's land. Yet, the Court of Appeals says it was sufficiently broad to embrace Taylor's land, at least where the Cadillac was. We disagree. We are reminded of the words of this Court in *Terry* v. *Ohio,* 392 U.S. 1, 17:

> "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States 353 US 346, 1 L Ed 2d 876, 77 S Ct 828 (1957); Go-Bart Importing Co. v. United States, 282 US 344, 356-358, 75 L Ed 374, 381-383, 51 S Ct 153 (1931); see United States v. Di Re, 332 US 581, 586-587, 92 L Ed 210, 216, 68 S Ct 222 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. Warden v.

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Hayden 387 US 294, 310, 18 L Ed 2d 782, 794, 87 S Ct 1642 (1967) (Mr. Justice Fortas, concurring); see, e.g., Preston v. United States, 376 US 364, 367-368, 11 L Ed 2d 777, 780, 781, 84 S Ct 881 (1964); Agnello v. United States, 269 US 20, 30-31, 70 L Ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925)."

United States v. *Hinton,* 219 F. 2d 324 (7th Cir., 1955) clearly illustrates the point. There two apartments were involved, occupied by different residents. Here there are two residences involved, the Pearl Combs residence and the Ollie Taylor residence. The Court forcefully announced and applied the constitutional premise that where two separate residences, or apartments, are occupied by different individuals, probable cause must be shown for searching each house or apartment. Absent such probable cause as to one, the search warrant must of constitutional necessity be confined solely to the other. *Annotation*: 11 ALR 3d 1330.

The warrant is likewise fatal for another reason pointed out in the Fourth Amendment and in *Hinton.* The Fourth Amendment requires that the warrant particularly describe "the place to be searched." In *Hinton,* the Court noted this requirement and defined it as such a description as to enable the officers who are commanded to make the search to identify the specific place for which there is probable cause to believe that a crime is being committed.

"General warrants," first condmned in *Entick* v. *Carrington,* 19 How St Tr 1029, motivated the Fourth Amendment. In prohibiting them, the Amendment makes general searches impossible. *Berger* v. *New York,* 388 US 41, 58.

This requirement is usually satisfied by giving the name of the occupant of the premises and/or describing its general location. This is usually adequate, and under *Ventresca,* the liberal interpretation of the affidavit and

warrant, coupled with the practical situation, has generally led the Courts to uphold the sufficiency of the description. *Steele* v. *United States,* 267 U.S. 498, 503.

But here the Taylor premises are not described by name, location or otherwise. The Court of Appeals says that they are embraced in with the concept of adjacent premises. But even the liberal construction announced in *Ventresca* could not bring "adjacent properties" within the constitutional requirement of "particularly describing the place to be searched."

There is no showing of probable cause to extend the search to the "adjacent" Taylor premises, making the warrant invalid as to the Taylor property even if described in the warrant. *Giordenello* v. *United States,* 357 U.S. 480; *United States* v. *Rich,* 407 F. 2d 934 (5th Cir., 1969).

We now turn to the Cadillac itself. If no probable cause was shown to extend the warrant to the Taylor property and the warrant by its terms did not describe the Taylor property, the only constitutional basis for upholding the search under *Coolidge* is to hold that probable cause for the searching of the Cadillac was set forth in the affidavit and the Cadillac itself was directed to be searched in the warrant. We need not reiterate that the officers observed the Cadillac, with the spare tire in the back seat and its rear end sitting low at the same time they observed the firearms in the Pearl Combs residence and the United States Commissioner was awaiting their return to Hazard for the purpose of accepting their affidavit for such search warrants as might be needed. *Taylor* v. *United States,* 286 U.S. 1.

The Cadillac is not mentioned in the affidavit in any way, no probable cause was shown in the affidavit as to it, and the search warrant made no effort to identify it and direct its search and seizure. Again the Courts have

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been liberal under *Ventresca* in permitting automobiles to be identified where this can be done by the officers as a practical matter on the ground. *Annotation*: 47 ALR 2d 1444. But we are unable to find any case, and surely there is none, where any Court anywhere has permitted the search and seizure of an automobile not on the premises to be searched, without probable cause as to the automobile and without any mention or description of the automobile in either the affidavit or warrant.

The decision of the Court of Appeals is tantamount to giving the Hazard Police and the ATF officers a blanket warrant to search the neighborhood of Pearl Combs, including adjacent streets, parking areas and the like, with authority to search and seize any motor vehicle owned by anyone on any such street or parking area, without probable cause and without describing the motor vehicle.

We do not need to remind this Court of the history of the Fourth Amendment and the purpose which the framers of our Constitution intended it to serve. The many decisions of this Court vigorously protecting and liberally construing this amendment will not permit it to be eroded in this manner.

CONCLUSION

Our conception of the Fourth Amendment is that it strongly prohibits the issuance of shotgun search warrants, and restrains peace officers from using a proper search warrant in an overreaching manner. This is what the right of the people to be secure in their persons, houses, papers, and effects, is all about. The search here is not only unreasonable, it is absurd. The officers searched a number of cars off the Pearl Combs premises before searching petitioners', and no doubt they would have wantonly ransacked other vehicles in the area if petitioner's trunk

had not yielded enough evidence to satisfy their official gluttony. We suggest that this is a serious constitutional issue, in dire need of definitive guidelines. The place and time to provide them is here and now. We ask the Court to do so.

Respectfully submitted,

C. KILMER COMBS
207 Caroline Avenue
Pikeville, Kentucky 41501
Attorney for Petitioner

APPENDIX

UNREPORTED ORAL OPINION OF THE DISTRICT COURT

[181] THE COURT:

Let the record show the defendants and their counsel are present in the courtroom and the attorney for the United States is present in the courtroom.

Gentlemen, I have read your respective memoranda. Do you have anything further to advance on this subject?

MR. COMBS:

If your Honor Please, did you get my last memorandum?

THE COURT:

About the Coolidge case?

MR. COMBS:

Yes.

THE COURT:

Yes, I got it Saturday and it destroyed part of my weekend reading it.

I have given this matter considerable thought, Gentlemen, and I am concerned with the search of the Cadillac automobile. I don't think there is any question on the evidence that was adduced here that these officers had authority to go in with this warrant of arrest on file and search this house for the defendant, Raymond Combs, and [182] while they had the information and thought they had seen him there on the porch and that he went in the house, and an apparent effort was made to divert their attention, I think they were entitled to go in there with the arrest warrant.

But I am gravely concerned about the search of the Cadillac automobile. It is not described in the search warrant. It was located on somebody else's property, and on top of that, they didn't search it at the scene. They started to prize (sic) it open, took some things out of it and put them all back in it and took it to the Police Station and proceeded to search it there some two or three hours later. I don't believe there was probable cause for the search of the Cadillac automobile, and to that extent the Motion to Suppress is sustained — as to the search of the car, and any evidence obtained thereunder.

As to anything found in the house at the time of the attempt to execute the warrant of arrest for the defendant, Raymond Combs, the Motion to Suppress is overruled, and it is so ordered.

* * *

[184] Of course, another question, they may overrule the Court's ruling. But, I just don't [185] believe you can stretch the wording of that affidavit for the search warrant, and the search warrant, to include this automobile sitting down there on apparently what is kind of a community parking space and not even on this property. In addition to those factors, there was nothing to preclude them from getting a search warrant for the car.

* * *

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

CRIMINAL NO. 10,302

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

ELISHA COMBS,
PEARL COMBS,
DEFENDANTS.

ORDER

(Filed December 8, 1971)

On December 6, 1971 at Lexington came the United States Attorney, Eugene E. Siler, Jr., the defendants in person and their attorney, Dan Jack Combs.

The Court heard counsel and being advised,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That the motion to suppress be and the same is hereby sustained insofar as the search of the Cadillac automobile owned by Elisha Combs is concerned, but said motion to suppress is in all other aspects overruled.

(2) The motion of United States for severance is sustained. The United States Attorney stated that the United States elects to try the defendant, Pearl Combs.

(3) It was further ORDERED that the case as to the defendant, Elisha Combs be and it is continued until the first day of the next regular session at Jackson, Monday, May 8, 1972.

December 8, 1971

/s/ BERNARD T. MOYNAHAN, JR.
JUDGE

Copies: U. S. Attorney
Dan Jack Combs

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1137

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. ELISHA COMBS, *Defendant-Appellee.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed October 10, 1972.

Before: PHILLIPS, Chief Judge, EDWARDS and KENT, Circuit Judges.

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EDWARDS, Circuit Judge. The government appeals from the District Judge's grant of a motion to suppress evidence (a sawed-off shotgun) which had been seized after a search of defendant Elisha Combs' Cadillac automobile. The Cadillac had been parked in a lot adjoining the home of Elisha's father, Pearl Combs.

The facts in this case are complicated. They start with a phone call from the Police Chief of Newport, Kentucky, telling the Police Chief of Hazard, Kentucky, that he had an arrest warrant for Raymond Combs (another of the sons of Pearl Combs) for possession of stolen property. He said that Raymond might be in Hazard, driving a 1968 Chevrolet. The Hazard Police Chief thereupon went to Pearl Combs' house with three other officers. The testimony accepted by the District Judge was that as they approached the house, one of the officers who knew Raymond saw him on the porch and saw him turn and go into the house. The police entered the house and went through it thoroughly, observing in the process a large number of firearms. Raymond had escaped.

Thereupon the officers reported to the Newport Police Chief what had happened and he told them that Pearl Combs (and Elisha) had previously been convicted of a felony. The Hazard Chief then went to the United States Commissioner and obtained a search warrant for "the premises," including Pearl Combs' house and "all outbuildings and vehicles thereon, including any and all adjacent properties used by the said Pearl Combs."

The Hazard police then searched Pearl Combs' house and seized a veritable arsenal of weapons, including 48 firearms and over 500 rounds of ammunition. Also searched was a Cadillac automobile which the officers had observed parked about twenty feet from the house. It was a new Cadillac. It had the spare tire in the rear seat and the

car was sitting low to the ground in the rear. There is testimony that it was parked where the Combs family generally parked their cars, although it appears that the ground on which it was parked may not actually have belonged to Pearl Combs.

The officers asked Elisha for the key to the trunk and he denied that he had it. Shortly thereafter he slipped away from the officers and disappeared. Under these circumstances, they broke into the trunk and found a large inventory of stolen goods, and 29 shotguns, rifles and automatic weapons. The sawed-off shotgun which this appeal concerns was found later when the contents of the trunk were inventoried at the police station.

We believe that the warrant, under a nontechnical reading, *see United States* v. *Ventresca*, 380 U.S. 102 (1965), authorized what the officers did here. The principal question appears to us to be whether or not the information supplied to the Commissioner was adequate to support the breadth of the warrant. We conclude that the affidavit was sufficient in this respect.

While the affidavit supplied no information relating directly to the new Cadillac where the sawed-off shotgun was found, it did supply ample facts to establish probable cause to believe a crime was being committed. The Hazard Police Chief swore.

> "[T]he facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I, the Chief of Police of Hazard, Kentucky, on October 13, 1970, at approximately 9:30 P.M., while on official duty attempting to execute an arrest warrant, together with Police Officers Robert G. Byrgo, Edgar Reynolds, Jr., and Captain George R. Smith, saw in the house situated on the Pearl Combs premises, a large number of firearms and ammunition some of which firearms were covered with blankets

and sheets, some in uncovered stacks, and some sitting in corners, behind doors, and along the walls of said house. I personally know that Pearl Combs is a convicted felon. I make this affidavit at 2:10 A.M., on October 14, 1970."

The record indicates that the Cadillac was on "the premises" situated closely enough to the house to be within legal concept of curtilage. *See Fine* v. *United States*, 207 F.2d 324 (6th Cir. 1953); *United States* v. *Potts*, 297 F.2d 68 (6th Cir. 1961). The record also indicates that this house was located in a remote area. The arsenal found therein could hardly have been brought there by any means other than automobile. Under these circumstances we feel it was permissible for the Commissioner to infer from the facts before him probable cause to believe that vehicles on the premises contained similar weapons to those found in the house.

The District Judge appears to have decided this case on the strength of *Preston* v. *United States*, 376 U.S. 364 (1964). It appears to us, however, that a later case, *Chambers* v. *Maroney*, 399 U.S. 42 (1969), sanctions the police station inventory which was conducted here — particularly since in fact the officers who made the search had secured a search warrant which by its terms authorized it.

The judgment of the District Court is reversed and the case is remanded for further proceedings.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

No. 72-1137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ELISHA COMBS,
Defendant-Appellee.

ORDER

(Filed January 8, 1973)

Before: PHILLIPS, Chief Judge, EDWARDS and KENT, Circuit Judges.

On motion for rehearing of the above-styled case, appellant's counsel for the first time attacks the adequacy of the affidavit to support the search warrant issued in the instant case, relying primarily upon *United States* v. *Bass*, 404 U.S. 336 (1971). No such issue was presented before the District Court which found the search warrant valid, nor was any such issue presented on appeal.

The motion for rehearing is denied, no active judge of this court having moved for rehearing in banc. *See Burnet*

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v. *Commonwealth Improvement Co.*, 387 U.S. 415, 418 (1932). *See also Helvering* v. *Wood*, 309 U.S. 344, 349 (1940).

Entered by order of the court

/s/ JAMES A. HIGGINS
Clerk

AFFIDAVIT FOR SEARCH WARRANT

"BEFORE Kelly Clore, Pineville, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

The Pearl Combs residence consisting of a one story frame dwelling painted white with 5 or 6 rooms, basements, attics, and appurtenances and having a porch on the West and North sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the East side of the Gorman Hollow Road, approximately 1 mile from the junction of the Gorman Hollow Road and Kentucky State Highway 451, and being approximately 50 yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately ½ mile, in a Southerly direction, from the old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs

in the Eastern District of Kentucky

there is now being concealed certain property, namely

> A large number of illegally possessed firearms and ammunition including automatic, Pump, Single barrel and double barrel Shotguns, Automatic, Bolt Action Repeaters, and single shot 22 calibre rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms, and also various types of ammunition

which are Illegally possessed by Pearl Combs who is a convicted felon

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I, the Chief of Police of Hazard, Kentucky, on October 13, 1970, at approximately 9:30 P.M., while on official duty attempting to execute an arrest warrant, together with Police Officers Robert G. Byrgo, Edgar Reynolds, Jr., and Captain George R. Smith, saw in the house situated on the Pearl Combs premises, a large number of firearms and ammunition some of which firearms were covered with blankets and sheets, some in uncovered stacks, and some sitting in corners, behind doors, and along the walls of said house. I personally know that Pearl Combs is a convicted felon. I make this affidavit at 2:10 A.M., on October 14, 1970.

/s/ Sam L. Luttrell,
Signature of Affiant.

Chief of Police, Hazard, Kentucky,

Sworn to before me, and subscribed in my presence, October 14, 1970

/s/ Kelly Clore,
United States Commissioner.

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SEARCH WARRANT

To: AFT Special Investigators Donald F. Nierengarten and James L. Brown or any other authorized officer.

Affidavit having been made before me by Sam L. Luttrell, Chief of Police, Hazard, Kentucky.

that he is positive that on the premises known as

> The Pearl Combs residence, consisting of a one story frame dwelling painted white with five or six rooms, basements, attics, and appurtenances, and having a porch on the west and north sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the east side of the Gorman Hollow Road, approximately one mile from the junction of the Gorman Hollow Road and Kentucky State Highway 415, and approximately fifty yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately one-half mile, in a southerly direction, from old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs
>
> in the Eastern District of Kentucky,

there is now being concealed certain property, namely

> a large number of illegally possessed firearms and ammunition, including automatic, pump, single barrel and double barrel shotguns, automatic bolt action repeaters and single shot 22 caliber rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms and also various types of ammunition

which are illegally possesed by Pearl Combs who is a convicted felon, in violation of Title 18, USC, Section 1202 (a) (1).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named by the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14th day of October, 1970

/s/ Kelly Clore,
U.S. Commissioner.

TESTIMONY IN THE DISTRICT COURT

Excerpts from Testimony of Bob Byrge, Hazard City Patrolman

[21] Q. Did you all go to the Combs residence in one vehicle, or more than one?

A. There was just one vehicle.

Q. Was that the Scout?

A. It was a Jeep.

Q. A Jeep?

A. Yes.

Q. About what time did you arrive at the residence?

A. Let's see — it took us around about, oh, fifteen minutes to get over there — to get up in the holler.

Q. What's the name of this hollow?

A Gorman Holler.

[22] Q. Do you know where Pearl Combs lives?

A. Yes, sir, I do.

Q. Is that inside or outside the City limits of Hazard?

A. That's outside the city.

Q. About how far?

A. Oh, about a hundred yards as the crow flies.

Q. What do you mean "a hundred yards as the crow flies?

A. Well, by the road, maybe it's not hardly a quarter of a mile.

* * *

Q. All right, where did you all park in rela- [23] tion to the Pearl Combs residence?

A. We parked up the road above the house.

Q. About how far up?

A. Twenty-five or thirty yards, maybe.

Q. Did you see some vehicles parked there above the house, beside the road?

A. Yes, sir.

Q. How many vehicles did you see?

A. Let's see — they was about four or five.

Q. Did you see a gray Cadillac there?

A. No, sir, it wasn't gray.

Q. Huh?

A. It wasn't gray.

Q. What color was it? Did you see a Cadillac there?

A. Yes, sir.

Q. What kind was it?

A. It was a '69 DeVille, rose colored, four-door.

Q. You parked up the road beyond this Cadillac?

A. Yes, sir.

* * *

[37] Q. All right. Now, when did you first notice this Cadillac that you described?

A. Well, the first time I saw it was when we went up to the house and pulled up above the house and come back down the road. We pulled above the house and then come back down the road.

Q. And you walked back by it coming back toward the house?

A. Yes, I believe we did.

Q. And did you know who owned the Cadillac?

A. No, sir, I didn't.

[38] Q. And then when you went from the house back to the Jeep you went by the Cadillac again?

A. Yes, sir.

Q. And did you see anything unusual about that Cadillac the first time?

A. Well, I never paid too much attention to it that first time.

Q. When did you first pay attention to it?

A. When we went back.

Q. And what did you pay attention to?

A. Well, I noticed it was setting down low on the ground, and had a spare tire in the back seat. Of course, we looked around, you knew.

Q. Now, then what did you do?

A. We got in the Jeep and left.

Q. Where did you go?

A. We went back to the Police Station.

Q. Then what did you do?

A. Well, I believe the Chief called Captain Garnick back, and then I went home.

Q. Did you hear the conversion between Captain Garnick and the Chief when he apparently called Captain Garnick?

A. No, sir, I didn't. I went on home.

Q. You didn't hear any of the telephone con- [39] versation?

A. No, sir, not the second time.

Q. Did you later return to the scene with the ATF officers?

A. Yes, sir, I did.

Q. Were you present when the United States Commissioner appeared in Hazard?

A. No, sir, I went home and got in bed and then they called me at the house.

Q. All right, now about what time did they call you?

A. Let's see — it was about 1:00 or 1:30, I'm not positive on the time.

Q. And then you went back to the police barracks?

A. Yes, sir.

Q. And who all was there when you returned?

A. Chief Luttrell, and Sgt. Reynolds, and Capt. Smith,

and ATF agents, Nierengarten and Brown, and the Commissioner.

Q. Is that United States Commissioner Clore?

A. Yes, sir.

Q. Were you present when Bud Luttrell signed an affidavit before the Commissioner?

A. Yes, sir.

[40] Q. Did you hear what Bud said to the Commissioner?

A. No, sir, I wasn't in the room when they made the search warrant out.

Q. You did not read the affidavit which was signed and sworn to by Chief Luttrell —

A. No, I did not.

Q. — that was filed with the United States Commissioner?

A. No.

Q. But you knew about this weighted rear end of the Cadillac and the wheel and tire in the back seat of the car before you went back to Hazard, didn't you?

A. (Witness indicating yes).

Q. And Chief Luttrell knew who that Cadillac belonged to, didn't he?

A. I don't know, sir. You would have to ask him.

Q. Do you know if he had any information available with reference to the type of car that Raymond Combs would likely be in?

A. Yes, sir, we did.

Q. What type of car did your information reveal?

A. It was a '68 Chevelle, gold color, and [41] they give us a license number off it.

Q. There wasn't any '68 Chevelle there, was there, that night?

A. No, sir, there wasn't.

* * *

Excerpts from Testimony of Edgar Reynolds, Sergeant, Hazard Police

* * *

[59] Q. I believe that – did you notice the Cadillac when you first went down the road from the Jeep to the house?

A. Yes, sir, I seen the Cadillac there.

Q. Did you notice it was kind of low in the rear?

A. Very low, yes, sir.

Q. Did you notice a wheel in the back seat?

A. Not right at that time, I did not.

Q. You learned that that was Elisha Combs during the time you were in the house, didn't you?

A. I was told by Elisha, yes, sir.

Q. Huh?

A. Elisha told us it was his car, yes, sir.

[60] Q. And that car was in the same shape and it was in the same position it was in when you all got back to the Combs house the second time, wasn't it?

A. Yes, sir.

Q. Did you leave anyone there to keep the place under surveillance until you went back the second time?

A. No, sir.

* * *

[64] Q. Now, you helped in the search of the Cadillac, didn't you?

A. Yes, sir.

Q. Who assisted you in that search?

A. Agent Brown, Captain Smith and Patrolman Byrge.

Q. Did Bud Luttrell help?

A. Not as I remember. I don't remember.

Q. Did Elisha tell you not to open the trunk.

A. Elisha said he did not have a key to the trunk of the car.

Q. Did he ask you or did you tell him that you had a search warrant?

A. We had a search warrant.

Q. Oh?

A. According to the search warrant, anything [65] on the premises or around the premises.

Q. Oh, I see, and it didn't describe this Cadillac, though, did it?

A. No, sir.

* * *

[68] Q. Why didn't you go get a search warrant for this car?

A. Why what, sir?

Q. Why didn't you get a search warrant for this car?

A. We had a search warrant for everything around the premises and everything on the premises.

* * *

[72] Q. Now, the only reason you all went into the trunk of that car was because you saw that it was weighted down in the rear and you saw the tire in the back seat? Now, isn't that the only reason you went in?

A. The only reason we went in, we had a search warrant for all guns, the house, the cars, or anything else that was on the property that Pearl Combs had.

Q. In other words, everything that you knew about that cadillac at the time you forcibly opened the [73] trunk of the car, you knew about it at 9:00 or 9:30 earlier that night?

A. We didn't know what was in the car, sir.

Q. That wasn't Pearl Combs' car, was it?

A. No, sir, it was Elisha Combs' car.

Q. But the warrant was for Pearl Combs' residence, wasn't it?

A. Yes, sir.

Q. And it was on the information that you had received when you went into Pearl's house, coupled with your knowledge that he had been convicted of a felony, that caused you to go get this search warrant in the first place, wasn't it?

A. Yes, sir.

Q. And that Cadillac had nothing to do with that offense against Pearl, did it?

A. Not to my knowledge.

Q. And the offense you were charging against Pearl had nothing to do with Elisha or his car, did it?

A. Not to my knowledge.

Q. There was about nine cars out there, wasn't there?

A. To the best of my knowledge, I only seen three, and one truck.

Q. And this was the only one you searched, wasn't it?

[74] A. No, sir, it was not.

Q. What?

A. We kind of looked through the other cars —

THE COURT:

I can't understand you. Did you search some of the rest of them?

A. Yes, sir, we kind of looked inside them. We didn't go into the trunk of any of them other than the Cadillac.

Q. And there was four cars down to the left of Pearl Combs' residence, wasn't there?

A. I think there was a house trailer down below Pearl's there somewhere.

Q. You didn't search any of those, did you?

A. And some junk cars.

Q. You didn't search any of those?

A. No, sir.

• • •

[79] Q. But you did see some cars to the left of the house?

A. Yes, sir.

Q. As you face Pearl's house standing on the main road?

A. Yes, sir.

Q. And that is to the left – that is the property to the left of Pearl's house, right?

A. On the left going up, right – going up.

Q. And did you search any of the cars that [80] were situated on the left of Pearl Combs' property?

A. No, sir.

Q. You just searched those on the righthand side of his house?

A. Yes, sir.

Q. And you don't know where the property line is between Pearl, or the righthand side of the house and his neighbor, do you?

A. No, sir, I do not.

Q. And you didn't know at that time?

A. No, sir.

* * *

Excerpts from Testimony of
Sam (Bud) Luttrell, Chief of Police, Hazard

[86] Q. And you saw the spare tire in the rear of the Cadillac then, and you noticed that the trunk was apparently loaded with something heavy, is that right?

A. On the way back to the Jeep I noticed that the spare tire for the Cadillac was laying in the back seat and that it was riding very low – looked like the back bumper was pretty low.

Q. And thereafter is when you went before the United

States Commissioner and signed the affidavit and got the search warrant for Pearl's residence, wasn't it?

A. That's right.

* * *

[100] Q. Did Elisha tell you not to open it?

[101] A. No, he just wouldn't give them the key.

Q. And who told them to get a crowbar?

A. Pardon?

Q. Did you hear anybody tell anybody to get a crowbar?

A. They told him if he didn't produce the key that they would have to force it. He had the ignition key, but he didn't have the key to the trunk.

Q. Was Elisha's car on Pearl's property or somebody else's property?

A. Well, it was parked right there close to the house where the whole family parks their cars.

Q. Was it on Pearl's property or someone else's property?

A. Man, I don't know who owns all that holler. It was right close to his house, though.

Q. About how far from his house was this Cadillac parked?

A. About as far as from here to that door out there?

Q. Would you say seventy-five feet?

A. Maybe.

* * *

Excerpts from Testimony of AFT Agent, James Brown

* * *

[133] Q. So you had the ignition key, and before you broke in the trunk, why didn't you drive the Cadillac to Hazard where the United States Commissioner was and obtain a warrant?

A. I didn't feel it was necessary.

Q. Mr. Combs was not trying to run off with the Cadillac, was he?

A. No, sir, I had the key.

Q. There was nothing exigent about the importance of going into the trunk of that car at that particular moment, was there?

[134] A. Well, I was there to search the residence and outbuildings, and so forth there, and had to search it while we were there. We had already searched the house and we started searching the vehicles.

Q. You didn't search all of them, though, did you?

A. Yes, sir, I did. All but the '60 Ford that was there that, I think, Mr. Combs said belonged to a neighbor that lived across the creek, or something, and we did not search it. It was locked. But there was a '57 Chevrolet there, and a pick-up truck and the Cadillac, and I did search all of them.

* * *

Excerpts from Testimony of Lester Combs, son of Pearl

* * *

[137] Q. Are you familiar with your dad's property lines up the hollow from the house?

A. Yes, sir.

Q. Who owns the property adjoining your dad there?

A. It's a bunch of heirs — Ollie Taylor — they ain't too many living right now. She's the one mostly that it belongs to right now.

Q. How far is the property line from your dad's home?

A. About seventy-five foot.

Q. There's a parking area up the creek from your dad's home, isn't there?

A. Yes, sir.

Q. And the Cadillac and some other cars were on this parking area?

A. Yes, sir.

Q. Who owns that property that that parking area is on?

A. Ollie Taylor.

THE COURT:

Who?

[138] A. Ollie Taylor.

* * *

[146] Q. And this particular parking location where the cars are parked in the picture, that's where the Cadillac and the pick-up truck were parked on the 13th and 14th of October, 1970?

A. That's right.

Q. And that's where your family generally parks when you go up to the house?

A. Sometimes we did and we wasn't supposed to, because they give us orders to not park out there any more.

Q. Who gave you orders?

A. Ollie Taylor.

Q. Ollie hadn't given you those orders in October, had she?

A. Yeah, she told us before then.

Q. But you had been using it?

A. Sometimes we did.

Q. And you had three cars belonging to the family there on the 13th and 14th of October, did you not?

A. Yes, sir.

Q. And whose Cadillac was that?

A. It was Elisha Combs'.